

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JAMES WHITE,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS
BOARD, GENERAL PRODUCTION
SERVICE et al.

Respondents.

F046805

(WCAB No. BAK 1032049)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review. Evelyn Dapremont,
Administrative Law Judge.

Chain, Younger, Cohn & Stiles and James A. Yoro, for Petitioner.

Rifenbark, MacNeil & Watkins and Douglas A. Watkins, for Respondents General
Production Service and Golden Eagle Insurance Corporation.

-ooOoo-

*Before Vartabedian, Acting P.J., Cornell, J., and Dawson, J.

James White petitions for a writ of review asking this court to inquire into and determine the lawfulness of the decision of the Workers' Compensation Appeals Board finding it lacked jurisdiction to reopen his settled disability claim after the expiration of the applicable five-year statute of limitations. (Lab. Code,¹ § 5950.) We disagree with White that equitable principals mandate a tolling of the limitations period and will deny the petition.

BACKGROUND

White worked as an equipment operator for General Production Service, insured by Golden Eagle Insurance Corporation (Golden Eagle), when he suffered a work-related injury to his lower back on April 1, 1997. On June 21, 2001, the parties settled White's workers' compensation claim under a stipulation with request for award, agreeing White was 43 percent permanently disabled and awarding him appropriate permanent disability payments and future related medical expenses.

The five-year statute of limitations period following the date of injury within which to petition the WCAB for "new and further disability" expired on April 1, 2002. (§ 5410.)

White filed a petition to reopen his disability award for new and further disability with the WCAB on June 28, 2002. In response to the petition, Golden Eagle reinstated temporary disability benefits effective the following day. The parties selected an Agreed Medical Examiner (AME) to evaluate White's condition. The AME issued a medical report declaring White permanent and stationary on April 1, 2003. On July 2, 2003, Golden Eagle terminated temporary disability payments but continued providing permanent disability payments until June 2004 pursuant to the terms of the stipulated agreement.

¹ Further statutory references are to the Labor Code.

A worker's compensation hearing occurred on August 26, 2004, to determine the WCAB's jurisdiction to act on White's petition to reopen. At the hearing, the assistant of White's counsel testified he immediately filed the petition to reopen after learning of White's change in condition in June 2002.

On September 17, 2004, a workers' compensation administrative law judge (WCJ) ruled the WCAB lacked jurisdiction to hear White's claim for new and further disability. The WCJ reasoned White filed his June 28, 2002, petition to reopen after the five-year limitations period expired on April 1, 2002, and failed to demonstrate equitable grounds for tolling the jurisdictional statute. On October 26, 2004, the WCAB denied White's petition for reconsideration and adopted as its own the WCJ's reasoning contained in her report and recommendation to the WCAB.

DISCUSSION

White contends the WCAB's finding that it did not have jurisdiction to hear and decide his claim for new and further disability after the five-year statutory limitations period ended under section 5410 was unreasonable and unsupported by substantial evidence. White contends that equitable considerations, when coupled with the Legislature's instructions to construe the workers' compensation laws liberally in favor of extending benefits to injured workers (§ 3202), require annulling the WCAB's order denying reconsideration.

In reviewing a WCAB order, decision, or award, an appellate court must determine whether, in view of the entire record, substantial evidence supports the WCAB's findings. (§ 5952; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) "Although the WCAB's findings on questions of fact are conclusive (§ 5953), the construction of a statute and its applicability to a given situation are matters of law that are reviewable by the courts." (*Rex Club v. Workers' Comp. Appeals Bd.* (1997) 53 Cal.App.4th 1465, 1470-1471.)

“ ‘Section 5410 permits the reopening of a prior decision of the WCAB for “new and further disability” upon the filing of a petition of the injured employee within five years of the date of injury.’ ”² (*Nicky Blair’s Restaurant v. Workers’ Comp. Appeals Bd.* (1980) 109 Cal.App.3d 941, 954.) “ ‘The term “new and further disability” has been defined to mean disability which results from some demonstrable change in an employee’s condition,’ ” such as a recurrence of temporary disability, a new need for medical treatment, or the change of a temporary disability into a permanent disability. (*Id.* at p. 955.)³

White cites several WCAB and appellate cases to support his proposition the statute of limitations period should be extended so as to deem his petition to reopen timely filed. We find none of the cases applicable here.

The employees in *General Foundry Service v. Workers’ Comp. Appeals Bd.* (1986) 42 Cal.3d 331 and *Los Angeles Unified School District v. Workers’ Comp. Appeals Bd.* (1985) 50 Cal.Comp.Cases 285 (review denied) were exposed to asbestos -- a carcinogen with a long latency period. In both cases, the WCAB expressly retained jurisdiction beyond the five-year period. The Supreme Court noted, under such circumstances, the WCAB “may reserve jurisdiction on the issue of permanent disability

² Section 5410 provides in relevant part: “Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation, including vocational rehabilitation services, within five years after the date of the injury upon the ground that the original injury has caused new and further disability or that the provision of vocational rehabilitation services has become feasible because the employee's medical condition has improved or because of other factors not capable of determination at the time the employer’s liability for vocational rehabilitation services otherwise terminated. The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period.”

³ Although not raised before the WCAB, a workers’ compensation award may also be rescinded, altered, or amended upon filing a petition demonstrating “good cause” within five years from the date of the original injury. (§§ 5803, 5804.)

when an employee's condition is not stationary and then determine the issue after the statutory period.” (*General Foundry Service, supra*, 42 Cal.3d at p. 337.) White does not suffer from a progressive disease such as asbestos and the WCAB did not reserve jurisdiction over White's matter. Indeed, there was no foreseeable reason for the WCAB to retain jurisdiction as the claim had already been settled by way of a stipulated agreement.

In *Beaida v. Workmen's Comp. App. Bd.* (1968) 263 Cal.App.2d 204, 210, the appellate court concluded a letter written to the WCAB by a treating physician on behalf of the injured employee within the five-year limitations period could be liberally construed as a petition to reopen. Here, however, the WCAB did not receive such a letter putting it on notice that White's condition had worsened or suggesting the settled award was insufficient to compensate White for his industrial injury.

In *Ordorica v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 1037 and *Nolan v. Workers' Comp. Appeals Bd.* (1977) 70 Cal.App.3d 122, the appellate courts held an employer or insurance carrier may be estopped to plead a statute of limitations defense where its conduct induces an employee to refrain from filing a claim or a petition to reopen until after the statute of limitations has run. Although White suggests he somehow relied on Golden Eagle's reinstatement of temporary disability payments and consent to appoint an AME to report on his condition, it appears from the record provided that those actions were taken *after* White filed an untimely petition for reconsideration. Accordingly, he can not claim Golden Eagle's conduct enticed him to file an untimely petition to reopen. Moreover, even White's representative in charge of filing the petition to reopen testified he did not learn White's condition had worsened until after the limitations period had lapsed.

While section 3202's mandate that we construe workers' compensation laws liberally in favor of extending benefits to injured workers applies to construction of a statute of limitations period (*General Foundry Service v. Workers' Comp. Appeals Bd.*,

supra, 42 Cal.3d at p. 337), the Supreme Court recently reminded the courts not to ignore unambiguous language of a statutory limitations period. (*Honeywell v. Workers' Comp. Appeals Bd.* (Feb. 10, 2005) __ Cal.App.4th __, __ [2005 D.A.R. 1682] [examining the 90-day period for employer to reject liability so as not to create a reputable presumption of compensability under § 5402, subd. (b)].) *Honeywell* also emphasized the detrimental reliance element required to equitably toll a statute of limitations. Having failed to demonstrate White filed the petition to reopen as a result of his employer or insurance carrier's conduct, we cannot ignore the Legislature only granted the WCAB continuing jurisdiction over workers' compensation claims "within five years after the date of the injury" (§ 5410.)

DISPOSITION

The Petition for Writ of Review, filed December 1, 2004, is denied. This opinion is final forthwith as to this court.